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Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants,

vs.

PAUL FANNIN, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATEMENT AS TO JURISDICTION

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PRELIMINARY

This is an appeal from an order of the United States District Court for the District of Arizona, dated September 18, 1962, disimpaneling a previously convened three-judge district court based on an opinion that this is not that kind of case calling for the special statutory district court. [Tr. 11 (1-2); App. 47-48][1] The order appealed from for all

[1] Reference numbers appearing herein within brackets and preceded by "Tr." refer to pages of the typewritten transcript of record; numbers preceded by "App." refer to a separately bound printed appendix accompanying this statement.

practical purposes dismissed the case for want of jurisdiction of the statutory court and thus disposed of the case. It is, therefore, an appealable final order. (28 U. S. C. § 1253) This statement is submitted to show that this Court has jurisdiction of this appeal and that the federal question alleged in the first amended complaint is serious and substantial.

OPINION

The opinion of the district court is not reported. It appears in the transcript of record. [Tr. 11 (1-2); App. 47-48]

FEDERAL STATUTES INVOLVED

28 U. S. C. § 1253 reads as follows:

"Direct appeals from decisions of three-judge courts.

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.—June 25, 1948, ch. 646, 62 Stat. 928.

28 U. S. C. § 2281 reads as follows:

"2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such sta-

tute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."—June 25, 1948, ch. 646, 62 Stat. 968.

STATE STATUTES INVOLVED

Subsections 14, 15, 16 and 18 of Section 15-102 of the Arizona Revised Statutes specifying the powers of the State Board of Education, read as follows:

"The state board of education shall:

"14. Exercise general supervision over and regulate the conduct of the public school system.

"15. Prescribe and enforce a course of study in the common schools.

"16. Prescribe the subjects to be taught in all common schools.

. . . . . .

"18. Prescribe textbooks for the common schools, and shall prepare a list of three textbooks for each grade and each subject taught in the common schools for the selection by the school district of one book from such list for each student. The books so selected shall be purchased by the school district direct from the publisher as provided in this title. Textbooks selected pursuant to the provisions of this title shall not be changed during the next five years."

Section 15-305 of the Arizona Revised Statutes, defining the duty of pupils, reads as follows:

"A. Pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers and the governing board.

"B. Continued open defiance of authority or habitual profanity and vulgarity, constitute good causes for expulsion."

Subsection A, paragraph 2, of Section 15-442 of the Arizona Revised Statutes, specifying the powers of the school trustees, reads as follows:

> "A. The board of trustees shall: . . .
>
> "2. Enforce the courses of study and select all textbooks used in the schools from the multiple lists determined and authorized by the state board of education pursuant to paragraph 18 of section 15-102 . . ."

Subsection B, paragraph 1, of Section 15-442 of the Arizona Revised Statutes reads as follows:

> "B. The board may:
>
> "1. Expel pupils for misconduct."

Subsection B of Section 15-1031 of the Arizona Revised Statutes reads as follows:

> "B. The state superintendent of public instruction shall prepare for use in the public schools a program providing for a salute to the flag and other patriotic exercises, as meet the requirements of the different grades. He shall also make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day, Flag day and other legal holidays of like character."

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Where appellants allege that the State Board of Education, acting under Sections 15-402 (14), (15), (16) and (18), Arizona Revised Statutes, has established the National Anthem ceremony as a part of the course of study in all elementary schools by prescribing for use of students the songbook containing it, the ceremony according to universal custom requiring all persons to stand for it, which the appellants' children refused to do because of conscientious religious objections, resulting in their expulsion from Pinetop Elementary School by the school trustees under Sections 15-305 and 15-442 of the Arizona Revised Statutes, does such action of the state board carried out by the school trustees constitute action by state officials under state statutes, the enjoining of which should require a statutory three-judge district court (28 U. S. C. §§ 2281 and 2284) and give this Court jurisdiction under 28 U. S. C. § 1253?

II.

Where the state action described in the above question is alleged to have deprived the appellants of their right of freedom of religion is there a substantial federal constitutional question involved as to whether the statutes, as construed and applied (1) establish a religion, and (2) deprive appellants of freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Appellants filed a complaint on February 19, 1962, in the United States District Court for the District of Arizona under the Civil Rights Act to redress the deprivation of their rights of freedom of religion and conscience by the appellees under the Arizona statutes described in the complaint which were alleged to be unconstitutional as construed and applied. [Tr. 1 (1-18)]

The prayer for relief asked the court to call a statutory three-judge district court to hear the case. [Tr. 1 (16-17, 18)] The Chief Judge of the Ninth Judicial Circuit on April 14, 1962, expressing doubt ordered a three-judge statutory district court impaneled. [Tr. 2; App. 42-43] On May 29, 1962, the deposition of the Arizona State Superintendent of Public Instruction was taken. [Tr. 3] The appellants on June 25, 1962, filed their first amended complaint. [Tr. 4 (1-22); App. 1-22]

Jurisdiction of the district court was invoked by 28 U. S. C. §§ 1331 and 1343 and 42 U. S. C. §§ 1983, 1985 (3) and 1988. [Tr. 4 (1-2); App. 1-2]

The duty of the State Board of Education and of the State Superintendent of Public Instruction, its chief executive officer, to regulate and prescribe the courses of study, textbooks and songbooks was alleged. [Tr. 4 (2); App. 2] The duty of the trustees of the Pinetop Elementary School to enforce the statutes involved and the policies and orders of the State Board of Education and its chief executive officer, the State Superintendent of Public Instruction, is alleged. [Tr. 4 (2-3); App. 2-3]

The conscientious religious objections of appellants to standing for the National Anthem are alleged to be not contrary to the "welfare of the state." [Tr. 4 (4); App. 4]

The statutes involved are set forth in paragraph 10 of first amended complaint. [Tr. 4 (5-8); App. 5-8, 22] It is then alleged that the state board prescribed a course in music and singing for the rural elementary schools of the

state, including the Pinetop school by issuing a songbook to be used by all students at the school music assemblies. [Tr. 4 (8); App. 8] The songbook is said to contain the National Anthem, and as a part of the course of study students are required to stand for the singing or playing of the National Anthem. [Tr. 4 (9); App. 8] It was alleged that the singing from the book prescribed by the state board constituted a regulation of the State Board of Education. [Tr. 4 (9); App. 8] The Pinetop board is obliged by the statute and the regulation of the state board to have the students stand for the National Anthem. [Tr. 4 (9); App. 8]

The National Anthem ceremony in effect at the Pinetop school "pursuant to the orders of the state board of education" on September 29, 1961, is alleged. [Tr. 4 (9-10); App. 9] The National Anthem was played on that date in music assembly in the school and Daniel Mark Sheldon, age 12, Merle William Wingo, age 14, and Jere Bruce Wingo, age 13, refused to stand as demanded by the principal, who ordered them to leave the school, it was alleged. [Tr. 4 (10); App. 9] Efforts of the parents to get the boys reinstated and excused are alleged. [Tr. 4 (10); App. 10] The Pinetop school officials in expelling the boys, it is alleged were acting as agents for the state board in the enforcement of the course of study. [Tr. 4 (11); App. 10] It is alleged that the chief executive officer of the state board later specifically ratified the expulsion of the appellants' boys. [Tr. 4 (11); App. 10]

It is alleged that the orders of the state board prescribing the songbook, the singing of the National Anthem and the standing for it constituted state action and construction of the statutes so as to make them "unconstitutional, as construed and applied . . . as hereinafter specifically alleged." [Tr. 4 (11); App. 10] Failure of attempts to provide private education for the boys is alleged. [Tr. 4 (12); App. 11] Threats to expel other children of Jehovah's Witnesses in many other schools

throughout the state for similar conduct are also alleged. [Tr. 4 (12-14); App. 11-13] Great and irreparable injury is alleged. [Tr. 4 (15-16); App. 14] Lack of adequate remedy at law is also alleged. [Tr. 4 (16); App. 15]

The various statutes, the "orders, policies, programs or regulations" of the state board "requiring standing for the National Anthem ceremony are unconstitutional, null and void, as construed and applied," it is alleged, because they "conflict with the First and Fourteenth Amendments" in six particulars. [Tr. 4 (16-17; App. 15-16] The absence of any administrative remedy and the lack of need to exhaust any remedy is shown. [Tr. 4 (18-20); App. 17-18]

The first amended complaint prays for an interlocutory injunction and for a final decree restraining the enforcement of the statute, as construed and applied, to deprive appellants of their constitutional rights. [Tr. 4 (20-22); App. 18-21]

The appellees moved to dismiss and for a summary judgment. [Tr. 5 (1-5); App. 27-28] Attached to the motion is an opinion of the County Attorney of Coconino County, concurred in by the Attorney General of Arizona, which provides that children of Jehovah's Witnesses "stand, but not sing, while other students were standing and singing the National Anthem." [Tr. 5 (3); App. 30, 33-36] The fourth trial amendment to the first amended complaint alleged that the opinion has been circulated by the state board and the state superintendent to the entire elementary school system of Arizona as the policy to be enforced against students who were Jehovah's Witnesses. [Tr. 10 (1-3); App. 25-26] The court did not rule on the motion to amend the complaint but "accepted them as offers of proof," and the fourth trial amendment and the other amendments were filed. [Tr. 11 (2); App. 46, 48]

The case on August 8, 1962, was ordered fixed for pretrial conference on September 17, 1962, and for trial on

September 18, 1962. [Tr. 19 (2); App. 51] The case came on for hearing before a properly constituted three-judge district court on September 17, 1962. [Tr. 19 (2); App. 51] The question of whether this is a proper case for a three-judge district court was argued. [Tr. 12 (1-44); App. 43-45] The court ordered that this was not a proper case for three judges. [Tr. 11 (1-2, 13 (1-4), 19 (3); App. 46-47, 47-48, 51-53] The order was entered on September 18, 1962. [Tr. 41 (2); App. 53] Appellants filed their notice of appeal on September 24, 1962 [Tr. 15 (1-3), 19 (3)] For good cause shown the time for filing the transcript of the record, docketing the case in this Court and the filing of the jurisdictional statement was extended to January 21, 1963, by an order entered on November 16, 1962. [Tr. 18, 19 (4)] The case has been docketed in this Court within the extended time.

ALL QUESTIONS RAISED ARE SUBSTANTIAL

Discussion of Substantiality of the Questions

I.

Where appellants allege that the State Board of Education, acting under Sections 15-102 (14), (15), (16) and (18), Arizona Revised Statutes, has established the National Anthem ceremony as a part of the course of study in all elementary schools by prescribing for use of students the songbook containing it, the ceremony according to universal custom requiring all persons to stand for it, which the appellants' children refused to do because of conscientious religious objections, resulting in their expulsion from Pinetop Elementary School by the school trustees under Sections 15-305 and 15-442 of the Arizona Revised Statutes, such action of the state board carried out by the school trustees constituted action by state officials under state statutes, the enjoining of which required a statutory three-judge dis-

trict court (28 U. S. C. §§ 2281 and 2284) and gave this Court jurisdiction under 28 U. S. C. § 1253.

The complaint alleges that the National Anthem[2] ceremony was prescribed by the state board as a part of the course of study for elementary schools in Arizona. [Tr. 4 (2-3, 8-9); App. 2-3, 8-9] It is also alleged that this was an official order or regulation of the board by designation of the songbook containing the National Anthem. [Tr. 4 (8-9); App. 8-9] The refusal of appellants' children to stand and their subsequent expulsion was alleged. [Tr. 4 (9-10); App. 9] The action of the state board in prescribing the National Anthem ceremony and the school trustees in carrying it out is alleged to be state action and to constitute state construction of the various statutes involved so as to make them unconstitutional. [Tr. 4 (11); App. 10] All the statutes and the "orders, policies, programs or regulations" made by the state board under the statutes "are unconstitutional, null and void, as construed and applies . . . because they conflict with the First and Fourteenth Amendments to the United States Constitution" in six particulars set forth in paragraphs 25 and 26 of the amended complaint. [Tr. 4 (16-17); App. 15-16]

The allegations specifically show the action of "state officials" and not "local officials" is directly involved and not incidentally. The unconstitutionality of the specified state statutes and of the orders of the state board are also directly drawn in question. The statute (28 U. S. C. § 2281) calls for a three-judge district court when the complaint for an injunction claims that "an order made by an administrative board or commission acting under state statutes" is involved.

Our challenge to the constitutionality is not confined to the order but the complaint extends it to the statutes, as construed and applied. This alone requires a three-

[2] The Star Spangled Banner is made the National Anthem by Congress which also says that when played "all present should stand and face toward the music."—36 U. S. C. §§ 170, 171.

judge district court. (*Query v. United States*, 316 U. S. 486, 489 (1943); *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10 (1930); *Kesler v. Department of Public Safety*, 369 U. S. 153, 155-156 (1962); *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715-716 (1962).

Three-judge district courts have been required on similar allegations in *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434 (1926); *Sterling v. Constantin*, 287 U. S. 378, 393, 397 (1932); *Louisville & Nashville Railroad Co. v. Greene*, 244 U. S. 522, 527, 528, 530, 531 (1917); *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 35-36 (1907); *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390 (1894); *Greene v. Louisville & Interurban Railroad Co.*, 244 U. S. 499, 506-508 (1917).

Even if the statute had not been challenged at all but there was merely a charge that the order of the state board establishing the National Anthem ceremony was challenged without an attack on the underlying statute there still would be required a three-judge district court. The Court has held that a challenge to the constitutionality of an order made by an administrative agency is sufficient to require a three-judge district court. (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292 (1923); *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 318 (1926); *Herkness v. Irion*, 278 U. S. 92, 93-94 (1928); *American Federation of Labor v. Watson*, 327 U. S. 582, 591-595 (1946); *Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341, 343 (1951)) The Act of Congress providing for the three-judge court includes "an order made by an administrative board or commission acting under state statutes." (28 U. S. C. § 2281) The National Anthem ceremony for the elementary schools of Arizona was expressly and solely established by the action of the state board in ordering the use of the songbook as a part of the course of study as alleged in the complaint. [Tr. 4 (8-9); App. 8]

The state officials, the board and superintendent, were not mere nominal parties. If they were, then the three-

judge statute would not be satisfied. (*Wilentz* v. *Sovereign Camp, W. O. W.*, 306 U. S. 573, 579-580 (1939)) The promulgation of the National Anthem order for the elementary schools is alleged to be and is, as a matter of fact and law, "directly attributable to the statute."—*Ex parte Bransford*, 310 U. S. 354, 361-362 (1940).

The statutes of Arizona place the government of all the schools of the state in the State Board of Education. Section 15-102, Arizona Revised Statutes, subsections 15 and 16, specifically commands the board to "prescribe and enforce" the course of study "for all schools" and to prescribe "the subjects to be taught in all common schools." Subsection 18 of the same statute requires that the board prescribe the "textbooks for the common schools." The action of the state board in the issuance of the songbook containing the National Anthem was to "prescribe and enforce" it in all schools, including Pinetop Elementary School.

It was not necessary for the legislature to spell out the National Anthem ceremony in the statute. The words "prescribe and enforce" the course of study and the textbooks are sufficient to make the issuance of the list of books including the songbook containing the National Anthem an order or regulation of the state board so as to require a three-judge court. The issuance of the list containing the songbook by the state board constituted action by state officials and not mere local officials.

The National Anthem carried with it the requirement of standing. (36 U. S. C. §§ 170, 171) See also the deposition of the state superintendent, who is the executive officer of the state board. [Tr. 3 (6)] He said it was common practice for the National Anthem to be played in the schools of Arizona and that the student stand at all times when the National Anthem is sung. [Tr. 3 (17-18)] He said that this practice would be one of the "other patriotic exercises" mentioned for the state superintendent to arrange in the elementary schools in Section 15-1031 of the Arizona Re-

vised Statutes. [Tr. 3 (18)] He also said that the refusal of the children to stand justified expulsion by Pinetop school officials. [Tr. 3 (26, 31-32)]

The requirement in the schools of Arizona that students stand for the National Anthem did not originate with the local school board. The local board is a mere agent of the state board in ordering the standing for the National Anthem, as is alleged in the first amended complaint. [Tr. 4 (2-3, 8-9, 11); App. 2-3, 8-9, 10] The state board, which has general control of the schools and specific authority to prescribe songbooks and order their use, is the board that is primarily responsible. The local school board is merely the "police officer" acting for the "governor", the head of the state board. The local board performs mere agency functions for the state board. The acts of the school trustees become the acts of the state board. [Tr. 4 (2-3, 8-9, 11); App. 2-3, 8-9, 11]

The trial court, at the oral argument, placed emphasis upon the absence of any express language in the statute and an express written order of the state board as making it a local school board matter and not a state board ruling. [Tr. 12 (16-17); App. 43-44] The presiding judge of the district court, however, later said "we are not disturbed by the fact that there was no written requirement of standing." [Tr. 12 (20); App. 44] He sharpened the issue merely by adding: "It is simply whether, instead of a governor taking action on behalf of the state, purportedly, it is the circumstances that we have a school district taking action on behalf of a school district." [Tr. 12 (20); App. 44] He went on to say: "we do not have a situation where this action would result in uniform state policy or action throughout the state." [Tr. 12 (20); App. 44]

This comment of the presiding judge, for the district court below, ignored the allegations of the complaint about the action of the state board in "prescribing" the songbook with the National Anthem in it and "enforcing" such order by circulation of the list of books with the songbook on

the list to the local school boards, whose mandatory duty under the statute is to use the songbook. (Section 15-442 (A) 2 of Arizona Revised Statutes) [Tr. 4 (7, 11), 7; App. 7, 10, 22] The matter must be determined by the allegations of the complaint.—*Ex parte Poresky*, 290 U. S. 30, 32 (1933).

The mere fact that some school boards have chosen not to enforce the statute and order against Jehovah's Witnesses by requiring a uniform standing in schools throughout the state is immaterial. A mere excessive exercise of authority or failure to exercise the mandate of a statute by state or local officials does not make it a case for only one judge. (*Sterling* v. *Constantin*, 287 U. S. 378, 393 (1932)) It is, nevertheless, a case for three judges.

The statutes involved here and the order of the state board in prescribing the course of study and enforcing it so as to require the National Anthem ceremony do not constitute a law of local nature such as a local ordinance or an isolated regulation of a local school board. (*City of Cleveland* v. *United States*, 323 U. S. 329 (1945)) The local Pinetop school board was performing a function of "statewide concern" in enforcing the National Anthem ceremony "prescribed" by the state board when it issued the list of books containing the songbook. None of the statutes is local in effect. They are statewide in scope. The order of the state board prescribing the songbook was not local in effect. It affects all the elementary schools throughout the state. The case does not involve only a local statute or order.

The action of the Pinetop school in ordering the National Anthem ceremony was not a mere discretionary act of the board of trustees that was local in nature. It was commanded by this language of the legislature of Arizona in a statewide statute: "Enforce the courses of study and select all textbooks used in the schools from the multiple lists determined and authorized by the state board . . ." [Tr. 4 (7); App. 22] The expulsion order for the three boys was specifically authorized by statute which, under the

facts, is alleged to be unconstitutional. [Tr. 4 (7-8, 11, 16-17); App. 7, 10, 15-16]

The order of expulsion by the Pinetop board was merely an ancillary order to enforce the "courses of study" order of the state board. This order of the state board is the basic thing that set in motion the chain of events that resulted in the ceremony, the order to stand and the expulsion because of the refusal to stand. It was a statewide order. It was not a mere local order or ordinance of the county superintendent or the local Pinetop board. The prayer to enjoin it required a statutory three-judge district court, regardless of the ancillary action of the local Pinetop board to enforce it.

What Judge Parker said in *Briggs* v. *Elliott*, 98 F. Supp. 529 (E.D. S.C. 1951), is applicable here as well as the holding that such case was a proper three-judge case. He said that the local school trustees "as officers of the state, have control of the schools in the district." See also *Davis* v. *County School Board*, 103 F. Supp. 337 (E.D. Va. 1952). Compare *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W.Va. 1942), Judge Parker, also a three-judge district court, where the flag salute statute and regulation were declared to be unconstitutional.

In *City of Cleveland* v. *United States*, 323 U.S. 329, 332 (1945), local officials were held to be officers of the state when enforcing statewide policy; see also *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd per curiam, 352 U.S. 903, where bus drivers were held to be officers of the state in that they had the authority to enforce state policy; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 94 (1935), where it is said: "Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves."

The state board and school board can be restrained by an injunction against their officers. Even the local school board officials must be considered state officers for purposes of three-judge court jurisdiction when they enforce statewide policy. Even Dobbs Houses, Inc., as lessee of city property on which it is operating a public accommodation also has been held to be an agency of the state within the contemplation of the Supreme Court's decisions construing the Fourteenth Amendment's restraints.—*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

Appellants recognize that a number of district courts have granted injunctions against the enforcement of obviously unconstitutional state school segregation statutes while sitting as single judge courts. See *Gray* v. *Board of Trustees of the University of Tennessee*, 100 F. Supp. 113 (E.D. Tenn. 1951), dismissed as moot, 342 U. S. 517, and see discussion of this point in *Davis* v. *County School Board*, 142 F. Supp. 616, 617 (E.D. Va. 1956), *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, mandamus den. 351 U. S. 948, aff'd 242 F. 2d 156 (5th Cir.), cert. denied 354 U. S. 921. See also cases in annotation, 4 L. Ed. 2d 1931, 1958, Note 1.

The policy considerations in terms of efficient judicial administration suggested by those decisions are perhaps best expressed by *Phillips* v. *United States*, 312 U. S. 246, 250, 251, in which Mr. Justice Frankfurter pointed out that the requirement of three judges "entails a serious drain upon the federal judicial system" and that the appealability of three-judge court orders directly to the Supreme Court places a strain upon the docket of the Supreme Court.

It may be, therefore, that notwithstanding the language of §§ 2281-2284, the Court appropriately might construe the three-judge court act to permit a single judge district court to enjoin the enforcement of a clearly unconstitutional statute as suggested in the segregation suits cited above. On the other hand, while single judge action in such cases may be permissible for reasons of sound judicial adminis-

tration, where three judges actually do take jurisdiction in a case involving an injunction against the enforcement of a state statute based on its constitutionality such jurisdiction properly has attached under the very terms and policy of 28 U. S. C. §§ 2281-2284.

Appellants' position therefore is this: the case falls within the language and policy of 28 U. S. C. §§ 2281-2284. As such, the three judges who took and exercised jurisdiction lawfully possessed such jurisdiction and they unlawfully abdicated when the order of September 18 was made. [Tr. 11 (1-2); App. 47-48] Although an alternative construction of 28 U. S. C. §§ 2281-2284 might be justified in the light of pressing problems of judicial administration—a single judge cannot act once three judges take jurisdiction of the case and they cannot escape it, but their order of abdication is appropriately reviewable by this Court under 28 U. S. C. § 1253.

Wherefore, it is respectfully submitted that this is a case for a statutory three-judge court.

II.

Where the state action described in the above question is alleged to have deprived the appellants of their right of freedom of religion there is a substantial question involved as to whether the statutes, as construed and applied (1) established a religion, and (2) deprived appellants of freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution.

The National Anthem has words of prayer, adoration and reverence to the Deity. See *Encyclopedia Americana*, Vol. 25, p. 491 (1956 ed.). To stand for the National Anthem is considered by appellants an act of religious worship. To stand for it is an affirmation that the one standing joins in the words of such National Anthem. To Jehovah's Witneses the very act of standing for the National Anthem

constitutes a religious act. The three Hebrew children, Shadrach, Meshach and Abednego, set the precedent for Jehovah's Witnesses when they refused to bow down at the sound of the musical instruments when played as a patriotic-religious piece of music throughout the land at the order of King Nebuchadnezzar of ancient Babylon. (Daniel 3: 13-28) The three Hebrew children had conscientious scruples against bowing down. This was based on their religious training as faithful servants of the Almighty God Jehovah.

In this case, instead of the children being required to bow down, the reverse is required. Instead of bowing down from a standing position the children at Pinetop have been required to stand up. There is absolutely no difference whatever from a religious standpoint between bowing down while standing and standing up from a sitting position. The change of bodily position is a mere act of obeisance on the part of the person making the change of position.

It may be argued that the act of standing is not a religious act. This argument cannot stand. The Constitution of the United States guarantees to the appellants and their children the right to hold it to be a religious act. Their discretion and judgment cannot be challenged or rejected by the State of Arizona or by the courts.—*United States* v. *Ballard*, 322 U. S. 78, 86-88 (1944).

It has been pleaded that the belief that standing is prohibited by the Bible is unreasonable. But that contention has never been sustained. It is not within the competency of the courts to say what is or what is not reasonable in reference to religious beliefs. See *Reynolds* v. *United States*, 98 U. S. 145 (1878). In the course of dictum, the Court quoted from the Virginia Statute for Religious Freedom, as follows: " 'that to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty.' "

This entire matter is controlled by *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943),

affirming 47 F. Supp. 251 (S.D. W.Va. 1942). These opinions show beyond doubt that it is beyond the authority of any official, state or federal, judicial, legislative or executive, to interfere in the field of religion. There is no difference between refusing to salute the flag and refusing to stand for the National Anthem. It would be a waste of the Court's time to argue extensively that the *Barnette* decision is applicable. It is *per se* applicable. The citation of these two opinions is sufficient. It would be merely gilding the lily to say more about them.

Footnote 21 of the opinion of Mr. Justice Black in *Engel v. Vitale*, 370 U. S. 421, (1962) at page 435, is applicable. Mr. Justice Black for the Court said that the singing of "officially espoused anthems which include the composer's professions of faith in a Supreme Being" does not constitute an establishment. The Court through Mr. Justice Black was there speaking by way of dictum that the singing of anthems that did not involve compulsion was not the establishment of a religion. But one cannot gainsay the overall tenor of the opinion in that case is to the effect that the compulsory singing of the National Anthem would be unconstitutional.

Even the New York daily prayer that was declared unconstitutional in that case, which was not compulsory and excused any objecting pupil from participation, was held to be unconstitutional. The language of Mr. Justice Black by way of dictum in footnote 21 seems to be for the purpose of saving the National Anthem from the anathema of the Court's opinion.—*Engel v. Vitale*, 370 U. S. 421, at page 435.

There can be no doubt that the compulsory standing for the National Anthem is unconstitutional. The concurring opinion of Mr. Justice Douglas (370 U. S. at pages 437, 439) states concerning the prayer at the opening of the Supreme Court as follows: "That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need

recite the New York prayer." In the event that the compulsory standing for the National Anthem is approved then it must be held that the compulsory standing therefor constitutes a state establishment of religion contrary to the disestablishment clause of the First Amendment to the United States Constitution, which is carried forward against the State of Arizona by the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that the commandment of the school authorities of Arizona that children of Jehovah's Witnesses stand for the singing of the National Anthem, their refusal to so stand, and the exclusion of such students because of their conscientious refusal constitute a construction and application of the statutes appearing under Title 15 of the Arizona Revised Statutes on the subject of education so as to make them unconstitutional because (a) they abridge the rights of the appellants to freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution and (b) they constitute an establishment of religion as construed and applied contrary to the First and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons above stated, this Court should conclude and order that the questions involved are substantial and of nationwide public importance so as to warrant the noting of jurisdiction. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submited,

HAYDEN C. COVINGTON
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Brooklyn 1, New York
Counsel for Appellants

December, 1962

CERTIFICATE OF SERVICE

I, Hayden C. Covington, counsel for appellants in the above cause, do hereby certify that proper service of the foregoing statement as to jurisdiction has been made in compliance with Rule 33 of the Rules of this Court.

I have deposited in a United States post office in the City of New York with airmail postage thereon fully prepaid—

(1) A sealed package containing five copies thereof addressed to Robert W. Pickrell, Attorney General of Arizona, State Capitol Building, Phoenix, Arizona; and

(2) A sealed package containing five copies thereof addressed to Fred Wilson, County Attorney of Navajo County, Holbrook, Arizona;

addressees above being counsel in the court below for all appellees.

HAYDEN C. COVINGTON

Dated at Brooklyn, New York.
December , 1962.